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IN THE

Supreme Court of the United States

October Term 1957

No. 542

MERVIN MOUNCE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, appellant below, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on June 28, 1957.

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit (R. 184-185) is not yet reported. It is reproduced in Appendix I, *infra*, pp. 51-52. The opinion of the United States District Court for the Eastern District of Washington (R. 17-24) is reported *sub nom. United States* v.

4200 Copies International Journal, 134 F. Supp. 490 (1955). It is also reproduced in Appendix II, *infra*, pp. 56-61.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 28, 1957 (R. 186). A duly filed petition for rehearing was denied on September 11, 1957 (R. 187). On September 18, 1957 the Court of Appeals for the Ninth Circuit granted a stay of its mandate pending the consideration and disposition by this Court of a petition for a writ of certiorari, provided such a petition was filed on or before October 14, 1957 (App. I, p. 55). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Is the standard of obscenity which the Court of Appeals for the Ninth Circuit, adopting the opinion of the federal District Court for the Eastern District of Washington, applied in this case, namely, that which "offends the sense of propriety, morality, and decency of" the average person of the community, in conflict with the standard which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476, 487 (1957), namely, that "which deals with sex in a manner appealing to prurient interest"?

2. Did the Court of Appeals for the Ninth Circuit, in judging the publications in this case rather than the conduct of the petitioner, decide a federal question in a way in conflict with this Court's decision in *Roth* v. *United States*, 354 U. S. 476 (1957)?

3. Does the federal obscenity statute, 19 U. S. C. §1305(a), 46 Stat. 688, violate the First and Tenth Amendments in that it improperly invades powers reserved to the states and to the people?

Constitutional and Statutory Provisions Involved

1. First Amendment.

> "Congress shall make no law • • • abridging freedom of speech, or of the press • • •."

2. Tenth Amendment.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. 19 U. S. C. §1305(a), 46 Stat. 688.

> "All persons are prohibited from importing into the United States from any foreign country • • • any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral • • •. No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter pro-

vided: * * * *Provided further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

"Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

"In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits."

Statement of the Case

Petitioner is a nudist and an advocate of the practice of nudism (R. 44). He has been in the nudist movement for eighteen years (see R. 133). He is a charter member of the Sunway Society, a nonprofit nudist organization incorporated under the laws of the state of Washington, and a past president of the American Sunbathing Association, a national nudist organization (R. 43-44).

Petitioner and other nudists, as well as a number of non-nudists, take the position that the practice of nudism will promote the physical and mental health of human beings. They believe that the practice of nudism will satisfy the healthy curiosity of children and eliminate the unhealthy curiosity of adults about the human body. (R. 45, 47-48, 130-131, 155, 162-165). One non-nudist testified that nudist publications with illustrative pictures would eliminate the peeping Toms in our midst (R. 164).

In order to espouse the cause of nudism and gain new adherents for it, petitioner distributed the nudist publications of various local, national, and international nudist groups (R. 46-48, 50-51, 54, 95, 140). Petitioner in writing advised his different distributors that his interest in selling these various publications was to promote nudism (R. 55). Seventy-one per cent of the converts to nudism came from reading nudist publications (R. 47).

Included among the periodicals which petitioner distributed was Sunshine & Health (R. 48-50, 74). Twenty-five issues of this periodical, from the March 1951 to and including the March 1953 issue, were held by the federal district court for the District of Columbia to be not obscene.

Sunshine Book Company v. *Summerfield*, D. D. C. Civil Action No. 3007/53, July 13, 1953. This decision was affirmed on appeal. *Summerfield* v. *Sunshine Book Co.*, 221 F. 2d 42 (D. C. Cir. 1954), *cert. denied*, 349 U. S. 921 (1955). Subsequently in another proceeding the federal district court for the District of Columbia held the February 1955 issue of Sunshine & Health to be obscene, *Sunshine Book Co.* v. *Summerfield*, 128 F. Supp. 564 (D. D. C. 1955), but this decision was reversed on appeal. *Sunshine Book Co.* v. *Summerfield*, D. C. Cir. No. 12622, May 31, 1956. Thereafter the government petitioned the Court of Appeals for the District of Columbia Circuit for a rehearing *en banc*. This request was granted. Reargument took place on September 25, 1956. Decision on the reargument has not yet been rendered.

Pictures illustrate the text of the nudist publications which the petitioner distributed (R. 52-53). These pictures were taken in nudist camps (R. 76, 87), and were put in these publications for the purpose of advancing nudism (R. 52). They present human beings in accordance with the conceptions of nudists as to the most harmonious relationship between human beings and the earth.

The profit motive was not involved in petitioner's sales of nudist publications. The amount which he made from the sale of foreign nudist publications, estimated at $750. a year, did "not justify the office expense and traveling and so forth to handle them" (R. 89). The bulk of petitioner's income came from property rentals (R. 90, 94-95). He handled nudist publications because he believed in nudism and wanted to promote the nudist movement (R. 95). He would not handle what he called "girlie" magazines (R. 131).

In May 1955 federal customs officials seized two shipments of foreign nudist periodicals, consigned to petitioner, and in July 1955 the district attorney for the Eastern District of Washington filed a libel against them under 19 U. S. C. §1305(a), 46 Stat. 688, on the ground that they were obscene (R. 3-14). Petitioner answered the libel and both sides waived a jury trial (R. 15-17, 40).

The case came on for trial in September 1955 (R. 38). The government rested its case for obscenity solely upon the pictures. It did not contend that any part of the text in any of the publications was obscene. The federal district judge accordingly stated in his opinion that the "character of the printed text in the publications is uniformly unobjectionable", 134 F. Supp. at 494, R. 22, App. II, pp. 59-60, and made a finding to this effect (R. 27).

At the trial two witnesses for the government, not members of any nudist organization, examined some of the photographs in the libeled magazines and testified that in their opinion these publications were obscene (R. 112, 126). Three witnesses for the petitioner, all members of the Sunway Society, two of them women, testified that they were acquainted with the libeled periodicals and that they were not obscene (R. 52, 100, 118). One of the women, in the words of the federal district judge, was "a mother and the other a grandmother" (134 F. Supp. at 493, R. 21, App. II, p. 59). One of these, Mrs. Faith Markell, was a housewife and the mother of six children ranging in ages from 25 down to 14 years (R. 97).

At a subsquent hearing in December 1955 to correct record errors six business men and officials of Spokane, Washington, who were not members of or in any way

connected with any nudist organization, testified that in their opinion the libeled periodicals were not obscene (R. 135-168), while one witness testified for the government that they were (R. 169).

The federal district judge conceded:

> ". . . The libeled books, with one exception, are nudist publications designed to portray nudist practices and to secure new converts to the movement". 134 F. Supp. at 493, R. 21, App. II, p. 59.

However, he held all of the issues of the various libeled publications, save four, to be "obscene and immoral", ordered them condemned, and directed the federal marshall to destroy them (R. 28, 30, 31). See also 134 F. Supp. at 494, R. 23-24, App. II, p. 494. The judgment of the federal district court was entered on December 30, 1955 (R. 31). Petitioner's motion to amend it was denied on January 19, 1956 (R. 34-35).

The Court of Appeals for the Ninth Circuit affirmed the judgment of the district court in a *per curiam* opinion filed June 28, 1957 (R. 184-185, App. I, pp. 51-52). Its judgment was entered on the same day (R. 186, App. I, p. 53). A petition for rehearing was denied on September 11, 1957 (R. 187). On September 18, 1957 the Court of Appeals for the Ninth Circuit granted a stay of its mandate (App. I, p. 55).

The federal district court in arriving at its conclusion that the libeled publications were "obscene and immoral" applied as the standard of obscenity that which "offends the sense of propriety, morality, and decency of" the average person of the community. 134 F. Supp. at 493,

R. 21, App. II, p. 58. Since, as the court observed, nudists were "very much in the minority" in this country, 134 F. Supp. at 493, R. 21, App. II, p. 59, nudist publications, so the court concluded, were obscene. If nudists should ever become a majority group here then, so the district judge indicated, nudist publications such as those in the instant case would not be obscene (R. 173). The Court of Appeals for the Ninth Circuit adopted the federal district court's opinion (R. 184-185, App. I, pp. 51-52).

Reasons For Granting The Writ

I.

The Court of Appeals for the Ninth Circuit in applying as the standard of obscenity in this case that which "offends the sense of propriety, morality, and decency of" the average person of the community decided a federal question in conflict with this Court's decision in *Roth* v. *United States*, 354 U. S. 476 (1957).

A.

Only That Is Obscene "Which Deals With Sex in a Manner Appealing to Prurient Interest". *Roth* v. *United States*, 353 U. S. 476, 487 (1957).

The exception which this Court created to the First Amendment in *Roth* v. *United States*, 354 U. S. 476 (1957) for obscenity is a very narrow one. Only that material is obscene "which deals with sex in a manner appealing to prurient interest". At 487. In a footnote the Court further defined such material as that "having a tendency to excite lustful thoughts". At 487 n. 20. The Court in its opinion continued: "The portrayal of sex, *e.g.*, in art, literature and

scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press". At 487.

But the Court of Appeals for the Ninth Circuit, adopting the opinion of the federal district court, did not apply this standard. Instead the lower courts applied as the standard of obscenity that which shocked the average person of the community. The federal district judge in his opinion pointed out that nudism was a deviation from the norm in our society. He said:

> " . . . .But nudism is a deviation from the norm at the present time in the United States. Its practitioners are very much in the minority and cannot be said to represent the common viewpoint in this country. The average American, except for works of art or illustrations in medical journals and the like, regards stark nudity, with brazen display of the adult male and female genitalia, as indecent and shocking." 134 F. Supp. at 493, R. 21, App. II, p. 59.

Applying as the standard of obscenity that which was shocking to the average person of the community the court concluded that the nudist publications involved in the instant case were obscene. The district court held:

> " . . . The standard to be applied is the judgment of the average, normal, reasonable, prudent person of the community in which the publication is circulated. If, at the time of such circulation, considered as a whole it offends the sense of propriety, morality, and decency of such average person, it is within the bar of the statute." At 134 F. Supp. at 493, R. 21, App. II, p. 58.

The Court of Appeals for the Ninth Circuit adopted this erroneous standard of obscenity. R. 184-185, App. I, pp. 51-52.

The federal district judge underlined his erroneous approach at the subsequent hearing which took place in this case in December 1955. At that time he commented from the bench:

> "So it is really a question of point of view, and if the nudists ever get the majority, why then, of course, their custom and point of view will prevail." R. 173.

But the standard of obscenity which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957), is narrower than that which the lower courts applied, and the reason this Court prescribed a narrow exception for obscenity was that this Court wanted to safeguard to us as full a measure of freedom of utterance as possible. The fact that ideas were hateful or shocking to us would not deny them the protection of the First Amendment. This Court in its opinion in the *Roth* case pointed out:

> "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."
>
> • • •
>
> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. • • • " At 484.

After defining the limited nature of the obscenity exception this Court further cautioned:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." At 488.

Had the lower courts in the instant case applied the prurient interest standard for obscenity they should have come to the conclusion that all of the publications here involved, certainly all of the nudist publications, were not obscene.

B.

Nudist Publications May Shock the Members of Our Clothed Society But They Do Not Appeal to Prurient Interest.

Such testimony as there was on the point was to the effect that the practice of nudism did not appeal to prurient interest. Petitioner testified that the American Sunbathing Association, a national nudist organization, had "no record of any juvenile delinquency in over twenty-five years in nudism in this country". (R. 47-48). There was further testimony of a corroborative nature (R. 101, 119).

The findings of psychologists and social scientists are to the same effect. Dr. Howard C. Warren, founder of the Department of Psychology at Princeton University, an editor of the Encyclopedia of Psychology and of the Psychological Review, made a first-hand study of nudism at home and abroad and found out that disrobing at nudist camps was entirely lacking in sex significance and aroused no more erotic feeling than taking off a cloak or an overcoat at a party. He sets forth the results of his study in an article entitled *Social Nudism and the Body Taboo,* 40 Psychological Rev. 160 (1933). He stated that the practice of nudism within the family served "as an antidote to the harmful sex-curiosity and prurient thoughts which are otherwise inevitable in adolescence." At 166.

Dr. Warren summarized his conclusions in part as follows:

> "The data gathered, supported by findings of earlier writers, led to the following conclusions regarding the psychological effects of social nudism:
>
> 1. On coming into contact with a nudist group, the subjective experience of *shame* and the objective experience of *shock* tend to disappear at once or after a short time, so far as could be observed.
>
> • • •
>
> 3. Where the entire group are unclothed, the sight of the naked body ceases to arouse curiosity. Nudity is accepted as a natural condition. Since there is nothing to focus the attention on any specific part, one has merely the impression of the body as a whole, and sex differentiae no longer possess special significance.
>
> 4. The writer's observations and the testimony of others indicate that social nudity is not produc-

tive of eroticism. There is less sexual excitement, less tendency to flirt, less temptation to ribaldry, in a nudist gathering than in a group or pair of fully clothed young people." At 181-182.

Dr. Warren cited among his authorities Gay, *On Going Naked* 54-56, 163 (1932); F. and M. Merrill, *Among The Nudists* 47 (1931); F. and M. Merrill, *Nudism Comes to America* 299 (1932); Parmelee, *The New Gymnosophy: The Philosophy of Nudity* 303 (1927); Royer, *Let's Go Naked* 192 (transl. fr. French 1932). Gay wrote:

> " . . . but when one mingles all day, day after day, with naked men and women, a penis comes to be not much more unique than an elbow or a knee, and little more remarked; and the contours of one woman seem very much like those of another, save that certain of them are more shapely." At 54.

More recently the columnist Earl Wilson visited a national nudist camp and came to the same conclusions as Dr. Warren. In an article in the March 1950 issue of *Esquire* he reported:

> "My ideas of the skinfolk were considerably altered by this visit.
>
> I heard no iniquitous talk about s-x. . . . But possibly after seeing the other sex nude they found themselves disinterested, because certainly most of these people were unattractive when you saw all of them at once.
>
> Even the dumbest show girls and stripteasers know that, and prove it by keeping on a G-string and at least a rosette. . . .
>
> As I drove away from those acres of epidermis, I felt quite lukewarm about the women there. But

> driving through the near-by town of Mays Landing, I saw a young girl in a skirt and sweater and, do you know something? I whistled." At 116.

Many social scientists support the statements of nudists, and of those who have observed nudists, to the effect that the nude human figure does not appeal to prurient interest or excite lustful thoughts. The Yale political and social scientist, Professor William Graham Sumner in his book *Folkways* 426-446 (1906) gave various instances of nude peoples who were chaste and clothed peoples who were immoral. The Court of Appeals for the District of Columbia Circuit in *Parmelee* v. *United States*, 113 F. 2d 729 (1940) quoted various passages from Sumner's book with approval. At 732-733 n. 16.

Havelock Ellis in 1 *Studies in the Psychology of Sex, The Evaluation of Modesty* (3rd ed. 1910) wrote:

> ". . . . A study of pictures or statuary will alone serve to demonstrate that nakedness is always chaster in its effects than partial clothing. As a well-known artist, Du Maurier, has remarked (in *Trilby*), it is 'a fact well known to all painters and sculptors who have used the nude model (except a few shady pretenders, whose purity, not being of the right sort, has gone rank from too much watching) that nothing is so chaste as nudity. Venus herself, as she drops her garments and steps on the model-throne, leaves behind her on the floor every weapon in her armory by which she can pierce to the grosser passions of men.'" At 61.

The Court in the *Parmelee* case quoted this passage with approval. 113 F. 2d at 732 n. 15.

John Carl Fluegel, a Fellow of the British Sociological Society and former Assistant Professor of Psychology of the University of London, in his book *The Psychology of Clothes* (International Psychoanalytic Library, No. 18, Ernest Jones, M. D., ed. 1950) commented:

> " • • • Indeed if, as is often done, we content ourselves with the simple equation of the immoral with the genitally sexual, these experiments show pretty conclusively that nakedness is a potent method of reducing immorality.
>
> "The real point to bear in mind is that modesty is essentially correlated with desire. Its purpose is to fight desire, but in so doing it rekindles it, so that a circular process is inevitably set in motion. As Anatole France so well says: 'Il est certain que la pudeur communique aux femmes un attrait invincible.'[2] Nature has, in fact, provided that modesty can never finally attain its end except through its own disappearance. • • •
>
> "[2] In the chapter in question (*L'Isle des Pingouins*, book ii, chap. 1) he puts, in his own inimitable way, the whole case that we are here urging." At p. 192.

Fluegel, in his last chapter, entitled *The Future of Dress*, made the further observation that modesty "can interpose no reasonable obstacle to nudity." At 235. Havelock Ellis agrees with him. The latter in his *The Psychology of Sex* (1946), a one-volume condensation of his seven-volume *Studies in the Psychology of Sex*, stated:

> " • • • At no stage of culture does modesty necessarily involve the use of garments. Some savages, who are habitually almost or completely naked, still exhibit modesty, while in modern life new customs

> of complete nakedness—'nudism,' sunbathing, the popular German Nackt-Kultur, etc.—leave modesty intact. . . . . (But how modifiable is modesty may clearly be seen by the increasing number of societies established for the practice of what is termed 'Nudism' whereby men and women in a completely unclothed state are enabled to meet socially without any embarrassment.)" At 36, 337.

Various modern educators support the position of nudists that the nude human body does not appeal to prurient interest. The National Congress of Parents and Teachers recommends adequate sex instruction for infants and children, including seeing the nude human body. Two pamphlets recommended by this organization are *Understanding Ourselves*, and *Your Own Story*. These volumes describe human birth and reproduction with sketches including drawings of the foetus in the womb at the age of two months and again shortly before birth. The pamphlet *Understanding Ourselves* is for children eleven years and up and contains detailed sketches of both male and female reproductive organs with the different parts named and their functions described.

Another pamphlet, entitled *Some Special Problems of Children Age 2 to 5 Years*, planned and written by Nina Ridenour, Ph.D., in collaboration with Isabel Johnson, and published by the National Association for Mental Health, Inc., in association with the New York Committee on Mental Hygiene, contains these paragraphs:

> "Let children of the opposite sex see each other when undressed. However young a child may be—two or three or four—he should be given an explanation when he shows interest or puzzlement over the

sex differences. Tell him in a casual, matter-of-fact tone: boys and men have a penis, girls and women have a vagina.

Answer his questions about babies in a way he can understand. If his natural curiosity is satisfied at each stage of his development, he will be more likely to have a normal healthy attitude towards sex and avoid some of the pitfalls of anxiety and fear and confusion so often associated with the subject." At 57.

A mimeographed outline put out by the New Jersey Congress of Parents and Teachers and based on the family education course of Dr. Mabel Grier Lesher contains this:

"IX. Vocabulary which will help child to understand answers to his questions

1. Pre-school vocabulary for 3 years old—sexual connotation to both sexes.

breast-nipple-abdomen-umbilicus (navel) urine and urinate-faeces (stool)—defecate—anus

Little boy by 3 years should know . . . penis-foreskin scrotum or scrotal sac

Little girl by 3 years should know . . . vulva

2. By 5 years in addition to all words above child should know bladder-urethra-rectum-ovary-ovum-egg-uterus (womb) vagina-labia-genital-pregnant-mating-fertilize

3. Child must have a healthy attitude about his bodily functions—proper vocabulary helps discuss functions in natural manner.

X. Child should have knowledge of body of opposite sex

1. See bodies of parents, brothers and sisters, in a natural way

2. If only child, arrange to have youngster see baby of opposite sex being bathed

3. Learning information as part of a natural experience avoids undue curiosity causing 'Peeping Toms'

4. Knowledge of appearance of bodies of both sexes helps child to grasp quickly the explanation of 'mating', thus relieving parent of undue embarrassment, since many parents find this question difficult to answer." At 3.

The testimony in this case, and such help as the other social sciences have to offer, point to the conclusion that the nude human body does not appeal to prurient interest. It should follow that the nudist publications involved in this case likewise do not appeal to prurient interest.

C.

The Human Nude Has Been With Us in Art for More Than Twenty-five Centuries and in Many Other Forms More Recently.

We have had representations of the human nude, both male and female, separately and together, in sculpture and painting for more than 2500 years. In this history the Greeks took the first steps. They produced monumental statues of naked youths beginning about the middle of the seventh century B.C. Since then we have had so many examples of the human nude in sculpture and painting that they are too numerous to mention. Human nudes in sculpture, painting and other art forms are on exhibition in various museums throughout the country. They have been reproduced in such widely disseminated publications as the *Encyclopaedia Britannica, Time, Life* and in numerous books on art.

The latest edition of the *Encyclopaedia Britannica* (1952) in its articles on *Sculpture* and *Sculpture Technique* contains reproductions of Michelangelo's *Slave*, vol. 20, Plate VII, opp. p. 230, and *Evening*, Plate X, Rodin's *The Kiss*, Plate VII, opp. p. 198, and *The Bronze Age*, Plate X, opp. p. 230, Donatello's *David*, Plate IV, opp. p. 198, Arthur Lee's *Dawn*, Plate XVII, and *Rhythm*, Plate XI, opp. p. 230, and Maillol's *Torso*, Plate XII. In its article on painting this work contains reproductions of Botticelli's *The Birth of Venus*, vol. 17, Plate IV, Correggio's *Mercury Instructing Cupid before Venus*, Plate VIII, Rubens' *Venus and Adonis*, Plate X, and Titian's, *Woman on a Couch*, Plate VIII. The earlier edition of this work in its articles on *Sculpture and Sculpture Technique* carries additionally Michelangelo's *Evening*, vol. 20, Plate V, opp. p. 224, Maillol's *Danae*, Plate XIX, opp. pp. 216-217, and Rodin's *Eternal Springtime*, Plate VIII, opp. 226-227 (14th ed. 1937). This edition on painting also shows one of Matisse's *Odalisques*, vol. 17, Plate XVI.

Life magazine reproduced Michelangelo's *The Creation of Man*, Dec. 26, 1949, pp. 25-48, Botticelli's *The Birth of Venus*, Velazquez's *Lounging Venus*, Correggio's *Awakened Danae*, Manet's *Unblushing Olympia*, Titian's *Bathing Goddess*, Rubens' *Three Graces*, Courbet's *Realistic Bather*, Renoir's nude painting of his wife, and a nude piece of sculpture by Praxiteles, Oct. 22, 1956, pp. 102-111.

Time reproduced a picture of Michelangelo's statue *David*, March 4, 1946, p. 99; Tintoretto's *Minerva Pursuing Venus*, June 11, 1956, p. 85; and Lucus Cranach's *Adam and Eve*, April 23, 1956, p. 87.

Reference may also be made to some of the numerous recent works on art containing reproductions of the human nude. See *e.g.* Kenneth Clark, *The Nude: A Study in Ideal Form* (1953); R. Lulies and M. Hirmer, *Greek Sculpture* (Michael Bullock transl. 1957); O'Malley and Saunders, *Leonardo da Vinci on the Human Body* (1952); Rodin (Phaidon 1951); Goldscheider, *The Sculptures of Michelangelo* (2d ed. 1950); Goldscheider, *The Paintings of Michelangelo* (2d ed. 1948); Martinie, *Rodin* (1947).

More recently representations of nude human figures have occurred in other fields than sculpture and painting. Such representations, of both male and female figures, have come to be used pretty freely in almost any field, and to illustrate almost any text. They are used in etching and photography. They are used in medical treatises and journals. They are used in text books and periodicals. They are used in various works giving sexual instruction and advice.

Almost two decades ago the court in *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940) thus summarized the situation at that time:

> "Nudity in art has long been recognized as the reverse of obscene. Art galleries, and art catalogues contain many nudes, ancient and modern. Even such a conservative source book as Encyclopaedia Britannica, contains nudes, full front view, male and female, and nude males and females pictured together and in physical contact.
>
> "The use of nude figures and photographs in medical treatises and textbooks is also commonly practiced today. * * *" At 734.

Representations of the human nude have increased still more since the time of that opinion, as the various publications we have cited will attest. Even such a tightly self-censored group as the movie industry, in the December 11, 1956 revision of its Production Code, permitted the filming of nude infants.

D.

Our Courts Have Accordingly Stated That the Human Nude Is Not Obscene; and Many Decisions Have Held That Nudist Books, Nudist Periodicals, Nudist Films and Nude Photographs Were Not Obscene.

Because of our long history with the human nude in various art forms, and more recently in numerous other forms, our courts have frequently stated that nudity per se is not obscene. See *e.g. Parmelee* v. *United States,* 113 F. 2d 729, 732 (D. C. Cir. 1940); *Maryland State Board* v. *Times Film Corp.,* 212 Md. 454, 129 A. 2d 833, 838 (1957); *People* v. *Muller,* 96 N. Y. 408, 411 (1884); *People* v. *Gonzales,* 107 N. Y. S. 2d 968, 969 (1951); *Sunshine Book Company* v. *Summerfield,* 128 F. Supp. 564, 569 (D. D. C. 1955), *reversed on other grounds,* C. A. D. C. No. 12622, May 31, 1956; *Commonwealth* v. *Hueston,* The Legal Intelligencer, Oct. 26, 1956, 25 U. S. Law Week 2193, 2194 (1956). Indeed, the district court in the instant case said so. 134 F. Supp. at 493, R. 20, App. II, p. 58.

Accordingly many cases have held that nudist books, nudist periodicals, nudist films and nude photographs were not obscene. See *e.g. Parmelee* v. *United States,* 113 F. 2d 729 (D. C. Cir. 1940) (Parmelee's book, *Nudism in Modern Life*); *Sunshine Book Company* v. *Summerfield,*

D. D. C. Civil Action No. 3007/53, July 13, 1953, *affirmed*, 221 F. 2d 43 (1954), *cert. denied*, 349 U. S. 921 (1955) (numerous issues of the nudist periodicals *Sunshine & Health* and *Sun Magazine*); *State* v. *Lerner*, 51 Oh. L. Abs. 321, 81 N. E. 2d 282 (1948) (seven issues of the nudist periodical *Sunshine & Health*); *Le Baron* v. *Olesen*, 125 F. Supp. 53 (S. D. Cal. 1954) (Marilyn Monroe coasters); *In the Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, 144 N. E. 2d 31 (1957), *affirming* 2 A. D. 2d 941, 156 N. Y. S. 2d 800 (1956) (nudist film *Garden of Eden*); *Matter of Capital Enterprises* v. *Regents*, 1 A. D. 2d 990, 149 N. Y. S. 2d 920 (1956) (motion picture *Mom and Dad*, depicting human birth); *Maryland State Board* v. *Times Film Corp.*, 212 Md. 454, 129 A. 2d 833 (1957) (film *Naked Amazon*, showing Camayura Indians in the jungles of Brazil, who live entirely unclothed); *American Museum of Natural History* v. *Keenan*, 20 N. J. Super. 111, 89 A. 2d 98 (1952) (film *Latuko*, which depicts the life of a nude African tribe); *Commonwealth* v. *Hueston*, The Legal Intelligencer, Oct. 26, 1956, 26 U. S. Law Week 2193 (photographs of the human nude).

In the Matter of Excelsior Pictures Corp. v. *Regents*, *supra*, Judge Desmond described the motion picture there involved, *Garden of Eden*, as "a fictionalized depiction of the activities of the members of a nudist group in a secluded private camp in Florida". 3 N. Y. 2d at 239, 144 N. E. 2d at 32. He further stated that in the film "the nudists are shown as wholesome, happy people in family groups practicing their sincere if misguided theory that clothing, when climate does not require it, is deleterious to mental health by promoting an attitude of shame with

regard to natural attributes and functions of the body' ". *Ibid.*. In holding the film to be not obscene he reasoned:

> "The pictured episodes are 'honestly relevant to the adequate expression of innocent ideas' (United States v. Kennerly, D. C., 209 F. 119, 120-121) just as are figures of nude men and women in the decor of public buildings including New York court houses, and in the pages of *National Geographic Magazine* and in ultra-respectable travel pictures." 3 N. Y. 2d at 239-240, 144 N. E. 2d at 32-33.

In *Commonwealth* v. *Hueston, supra,* involving nude photographs, the court reasoned:

> "On June 11, 1956 at page 85 of Time magazine, the editor published under the heading of 'Master of the Renaissance' a full color reproduction of Tintoretto's 'Minerva Pursuing Venus'. On April 23, 1956, the same publication carried Lucas Cranach's 'Adam and Eve' at page 87. Both Tintoretto's 'Venus' and Cranach's 'Adam and Eve' were, as were the women photographed in our exhibits, depicted in the nude, but certainly no one would call their work indecedent or obscene.
>
> "Are the exhibits in this case to be condemned because they fail to measure up to the artistic standards of a Renoir, Tintoretto or Cranach? I think not".

The nudist film *Garden of Eden,* according to the Court of Appeals of New York, "has been shown in 36 States and in many foreign countries". *In the Matter of Excelsior Pictures Corp.* v. *Regents,* 3 N. Y. 2d 237, 239, 144 N. E. 2d 31, 32 (1957).

These numerous holdings support petitioner's position that the nudist publications in the instant case in espousing the cause of nudism do not appeal to prurient interest.

E.

Nudists Further Urge That It Is Not Nudity But Partial Clothing That Has a Tendency to Excite Lustful Thoughts.

According to the nudists it is not nudity but partial clothing that excites lustful thoughts. It is the striptease, as its very name implies, it is the art of a Gypsy Rose Lee, the plunging neckline of a Faye Emerson, the sarong of a Dorothy Lamour, the sweaters on sweater girls and bikini bathing suits, and not nudism or nudist publications, that appeal to prurient interest (see R. 121). Again social scientists come to the support of the nudist position. Havelook Ellis in 1 *Studies In The Psychology of Sex* explains:

> "If the conquest of sexual desire were the first and last consideration of life, it would be more reasonable to prohibit clothing than to prohibit nakedness." At 197.

Robert Burton in his *Anatomy of Melancholy* (Dell and Jordan-Smith ed. 1951), after dealing at length with the allurements of love, concludes:

> "When you have all done, the greatest provocations of lust are from our apparel; * * * ". At 687.

Burton is quoted with approval by the court in *Parmelee v. United States*, 113 F. 2d 729, 732 n. 15 (D. C. Cir 1940).

Fluegel in his *Psychology of Clothes* (International Psychoanalytical library, No. 18, Dr. Ernst Jones, ed. 1950), makes the point that clothing originated not for reasons of protection or modesty, but in order to call attention to sex, in other words, in order to appeal to prurient interest. At 16-17, 26, 201. He states "that clothes not only serve to arouse sexual interest but may themselves actually symbolize the sexual organs". At 26. He further tells us that if we are opposed to the abolition of all unnecessary sex distinctions in costume, "let us be honest, and frankly admit that we are not in earnest about the undesirability of sexual stimulation, and that on the contrary we cannot bear to face the prospect of abolishing the present system of constant titillation". At 201.

But the Court of Appeals for the Ninth Circuit, adopting the opinion of the federal district judge, erroneously applied as the standard of obscenity that which is shocking to the average member of the community of our clothed society. Had it applied the correct standard, namely, that which appeals to prurient interest and has a tendency to excite lustful thoughts, it would have come to the conclusion that the publications involved in the instant case, certainly all the nudist publications, were not obscene.

II.

The Court of Appeals for the Ninth Circuit, in adopting the opinion of the Federal District Court, and judging the publications in this case rather than the conduct and intent of the petitioner, decided a federal question in conflict with this Court's decision in *Roth* v. *United States*, 354 U. S. 476 (1957).

Although the federal district judge in the instant case conceded that the publications here involved "with one exception, are nudist publications designed to portray nudist practices and to secure new converts to the movement" (134 F. Supp. at 493, R. 21, App. II, p. 59), he nevertheless proceeded to judge the publications and gave no weight to the conduct and intent of the petitioner. The Court of Appeals for the Ninth Circuit adopted his opinion (R. 184-185, App. I, pp. 51-52).

But as Mr. Chief Justice Warren pointed out in his concurring opinion in *Roth* v. *United States*, 354 U. S. 476 (1957) the conduct and intent of the petitioner have an important relevance. Chief Justice Warren stated:

> "• • • It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." At 495.

Or as Mr. Chief Justice Warren observed in his dissenting opinion in *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957):

> "• • • this New York law places the book on trial. There is totally lacking any standard in the statute for judging the book in context. The personal element basic to the criminal laws is entirely absent. In my judgment, the same object may have wholly different impact depending upon the setting in which it is placed. Under this statute, the setting is irrelevant.
>
> "It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature. • • •" At 445-446.

Or as the Court of Appeals for the District of Columbia Circuit observed in *Sunshine Book Company* v. *Summerfield*, No. 12622, May 31, 1956:

> "• • • Furthermore, neither the Department nor the District Court appears to have investigated or considered the intent of the publisher, one of the important elements in obscenity cases. Parmelee v. United States, supra, 72 App. D. C. at 209, 113 F. 2d at 735; United States v. One Book Entitled Ulysses, supra, 72 F. 2d at 707, 708. 'Honest, sincere' works must be distinguished from publications 'wholly for the purpose of profitably pandering to the lewd and lascivious.' Parmelee v. United States, supra, 72 App. D. C. at 209, 210, 113 F. 2d at 735, 736." At 3-4.

Had the federal district court considered the conduct and intent of petitioner the result which it would have reached should have been different. The petitioner distributed the publications involved in the instant case in order to promote the cause of nudism (R. 46-48, 50-55, 95, 140). Although the distribution of the publications in question was

not limited to nudists, the intent of the petitioner in distributing them to those who were not nudists was for the purpose of gaining new supporters for the practice of nudism. After all, 71 per cent of the converts to nudism came from reading nudist publications (R. 47). In distributing these publications the profit motive was not the petitioner's guiding influence (R. 89-90, 94-95). As the petitioner testified, he had other ways of making a living (R. 95). He further indicated that he would not distribute material which appealed to prurient interest. He testified:

> "Well, we call them 'girlie' magazines. They are devoted to sex and exorbitant disp'ay and emphasis of secondary sex characteristics, wit: women in outlandish positions, and suggestive jokes. We would not handle that type of material at all." R. 131.

Moreover, the pictures in the publications in the instant case were taken in nudist camps and were put in these publications for the purpose of illustrating the text and advancing the cause of nudism (R. 52-53, 76, 87). Nudists feel that in order to present their ideas intelligently and effectively they need pictures to illustrate the text and show the healthy enjoyment that people derive from being out of doors in the nude. In the present state of development of the graphic arts, and in these days of pictorial newspapers, magazines and books, the force of this argument should readily be conceded. Indeed, in *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940) the Court quoted with approval this portion of the preface of Parmelee's book *Nudism in Modern Life*:

> "The illustrations depict better than words can describe the natural and normal life, and the beautiful and healthful methods and activities of a gymno-

> sophic society. They portray them as actually applied in several European countries by many thousands of men, women and children of all classes, occupations and conditions, while the text discusses its scientific, hygienic, cultural, aesthetic, ethical and humanitarian significance." At 737.

Had the federal district judge and the Court of Appeals for the Ninth Circuit taken into consideration the conduct and intent of the petitioner, his belief in nudism and his desire to advance it, his distribution of the publications in question in order to gain new converts to nudism, the absence of a dominating profit motive, and the use of the pictures in these publications to make more effective the presentation of the ideas of nudists, the scales should have been tipped in favor of the legality of these publications.

III.

The Federal Obscenity Statute, 19 U. S. C. §1305(a), 46 Stat. 688, violates the First and Tenth Amendments in that it improperly invades powers reserved to the States and to the People.

In *Roth* v. *United States*, 354 U. S. 476 (1957) the Court, in holding constitutional a federal obscenity statute relating to the use of the mails, took this as its starting point: "The guarantees of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes." At 482.

But the difficulty with the Court's stand is that the framers of the First Amendment, as their opposition to the Sedition Act of 1798 emphasized, intended the states to have certain powers over speech which they expressly sought to deny to the federal government. Specifically they took the position that the states and not the federal government had jurisdiction over the offense of seditious libel. They would have taken the same position with reference to the offenses of blasphemy and profanity, and, later still, obscenity—the first reported decision in this country sustaining a conviction for obscenity did not occur until 1815,[1] more than a quarter of a century after

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[1] *Commonwealth* v. *Sharpless*, 2 S. & R. (Pa.) 91. As late as 1795 an edition of Hawkins read: "And it seems, that a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable at all by any prosecution at common law, as I have heard agreed in the court of king's bench . . ." 2 PLEAS OF THE CROWN 130 (Leach ed.). See also *Roth* v. *United States*, 354 U. S. 476, 514 (1957) (dissenting opinion of Mr. Justice Douglas); GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 99 (1956); Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 47 (1938); Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. L. REV. 36, 52 (1930); Lockhart and McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 324 n. 200 1954); Note, 52 MICH. L. REV. 575, 576 (1954).

Likewise the first state legislation on the subject did not begin to appear until 1821. Stat. Laws of Conn. 165 (1821).

But the Court in the *Roth* case stated: "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity too, was outside the protection intended for speech and press." 354 U. S. at 483. In support of this statement the Court cited the *Sharpless* case and *Knowles* v. *State*, 3 Day (Conn.) 103 (1808), and *Commonwealth* v. *Holmes*, 17 Mass. 335 (1821), as well as the statute of Connecticut of 1821 and one of New Jersey of 1798, among others. Knowles was charged with exhibiting an indecent and unseemly picture "representing a horrid and unnatural *monster*", but on appeal his conviction was reversed. Also, the New Jersey statute to which the Court referred is not in point. It prohibited

the first Congress proposed the first Ten Amendments. A consideration of the intent of the founders of this country with reference to state power over speech will underscore the fact that they intended the federal government to have no power in this area.

First however, however, some qualifying observations about the Court's statement are in order. The ten states to which the majority opinion refers are Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, South Carolina, Vermont and Virginia. These reduce to nine as of the date when the first Congress proposed the first Ten Amendments (September 25, 1789); for the cited constitution of one of them, Delaware, dated from 1792. 354 U. S. at 482 n. 10. In the second place the state constitutional provisions were not always in as sweeping terms as the First Amendment. For example, the Vermont constitution of 1786 expressly identified freedom of speech and of the press with discussions of "the transactions of government." C. I, §15.[2] In the third place these state constitutional provisions at times

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stage performances but did not deal with obscenity. Laws of New Jersey 331-32 (Paterson 1800). It would thus seem that the Court's statement is somewhat too broad.

However, an act of 1711 of the colony of Massachusetts Bay made it an offense to write, print or publish "any Filthy Obscene or Prophane Song, Pamphlet, Libel or Mock-Sermon, in Imitation or in Mimicking of Preaching, or any other part of Divine Worship. . . ." Acts and Laws of Mass. Bay 222 (1714). On the basis of this act the Court concluded: "Thus, profanity and obscenity were related offenses." 353 U. S. at 483. One will have to concede the validity of this conclusion. The attitude which excluded blasphemy from free speech guarantees would deal similarly with obscenity when that offense developed.

[2] The Court referred to the declaration of rights in the Vermont constitution of 1777, c. 1, §14, which did not contain this restricting identification.

contained exceptions. The Pennsylvania constitution of 1790 and the Delaware constitution of 1792 had exceptions for seditious libel, that of South Carolina of 1790 for licentiousness, and that of Maryland of 1776 for immorality. The Pennsylvania constitution of 1790 provided that in seditious libel prosecutions truth was to be a defense and "the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." Art. IX, §7.[3] The Delaware Constitution of 1792 contained a similar provision. Art. I, §5. The South Carolina constitution of 1790 in providing for religious freedom expressly stated: "That the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." Art. VIII, §1. The Maryland declaration of rights of 1776 had this exception: ". . . unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality . . ." Art. XXXIII.[4] By way of contrast the First Amendment provided without qualification: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

In the fourth place the states did not always observe their own constitutional provisions. As Madison pointed out when he submitted his proposed amendments to the

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[3] Again, in the case of Pennsylvania, the Court referred to the declaration of rights in an earlier constitution, that of 1776, art. 12, which again was more broadly drawn.

[4] Of the remaining five there were two whose constitutions provided that freedom of the press was to remain inviolate. GA. CONST. art. LXI (1777), art. IV, §3 (1789); N. H. CONST. art. 1, §22 (1784). The remaining three provided that the liberty of the press was not to be restrained. MASS. CONST., Declaration of Rights, art. XVI (1780); N. C. CONST. Declaration of Rights, art. XV (1776); VA. CONST., Declaration of Rights, §12 (1776).

first Congress in June 1789: " . . . there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated . . . ". 1 ANNALS OF CONG. 439 (Gales, comp. 1834).

However, the main difficulty with the Court's action in sustaining the validity of a federal obscenity statute lies in the fact that the framers of the First Amendment intended that whatever governmental power existed over utterances was to reside in the states rather than the federal government. The proceedings of the First Congress on the first Ten Amendments show this; the opposition to the Sedition Act of 1798 stresses it; and the defeat of President Jackson's proposal for barring "incendiary publications" from the mails reaffirms the point.

One of Madison's proposed amendments provided: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." *Id.* at 435. This proposed amendment came from Madison alone. No state convention asked for it. In offering it he explained: " . . . it is proper that every Government should be disarmed of powers which trench upon those particular rights. I know, in some of the State constitutions, the power of the Government is controlled by such a declaration; but others are not. I cannot see any reason against obtaining even a double security on those points; and nothing can give a more sincere proof of the attachment of those who oppose this constitution to these great and important rights than to see them join in obtaining the security I have now proposed; because it must be admitted, on all hands, that the State Governments are as liable to attack these invaluable privileges as the Gen-

eral Government is, and therefore ought to be as cautiously guarded against." *Id.* at 441.

The House sent Madison's proposals to a special committee of which he was one of the members. The special committee revised this proposal to read: "No State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases." See *id.* at 755.

Representative Thomas Tucker of South Carolina objected to it: "This is offered, I presume, as an amendment to the constitution of the United States, but it goes only to the alterations of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much. I therefore move, sir, to strike out these words."

But: "Mr. Madison conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people." *Id.* at 755.

Madison won out in the House. After a further minor revision this proposal went to the Senate in this form: "No State shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the free-

dom of speech, or of the press." 5 DOCUMENTARY HISTORY OF THE CONSTITUTION 193, 197 (Dept. of State 1905). But in the Senate the position which Tucker took in the House won out, and this proposal was rejected.

The national debate on the Sedition Act of 1798 underlined the point that the states had a certain amount of power over utterances which was denied the federal government. In the debates in Congress Nicholas of Virginia, Nathaniel Macon of North Carolina and Edward Livingston of New York all drew a distinction between state and federal power. Nicholas: " . . . He had heard it said that all the States take cognizance of offenses of this sort. But does that give the power to the General Government? Because the States declare certain things offenses, have the General Government power over the like offenses? If so, it would have a concurrent power with all the State Governments which, he believed, would be a novel idea. Indeed, he was utterly at a loss to find any ground upon which to found a law of this kind. He was confident there was none." ANNALS OF CONG. 2142, 5th Cong. 2d Sess. (1798).

Macon: " . . . He thought this subject of the liberty of the press was sacred, and ought to be left where the Constitution had left it. The States have complete power on the subject, and when Congress legislates, it ought to have confidence in the States, as the States ought also to have confidence in Congress, or our Government is gone. . . ." *Id.* at 2152.

Livingston: " . . . Every man's character is protected by law, and every man who shall publish a libel on any part of the Government, is liable to punishment. Not,

said Mr. L., by laws which we ourselves have made, but by laws passed by the several States. And is not this most proper? . . ." *Id.* at 2153.

Madison took the same position in his *Address* and subsequent *Report* on the Virginia Resolutions of 1798. In his *Address* he stated: ". . . But the laws for the correction of calumny were not defective. Every libellous writing or expression might receive its punishment in the State courts . . ." 6 THE WRITINGS OF JAMES MADISON 334 (Hunt ed. 1906); 4 ELLIOT, DEBATES 530 (2d ed. 1881). In his *Report* he added that libelled federal officials had to seek redress "under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties." 6 *id.* (Madison) at 393; 4 *id.* (Elliot) at 573.

A few months before his second inauguration Jefferson wrote to Mrs. John (Abigail) Adams, the wife of his political opponent in the presidential campaign of 1800: ". . . Nor does the opinion of the unconstitutionality, and consequent nullity of that law [Sedition Act of 1798] remove all restraint from the overwhelming torrent of slander, which is confounding all vice and virtue, all truth and falsehood, in the U. S. The power to do that is fully possessed by the several State Legislatures. It was reserved to them, & denied to the General Government, by the Constitution, according to our construction of it. While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right, to do so." Letter of Sept. 11, 1804. 10 THE WORKS OF THOMAS JEFFERSON 89-90 n. (Fed. ed. by Ford 1905). A decade and a half earlier he had written Madison from Paris: ". . . A declaration that

the federal government will never restrain the presses from printing any thing they please, will not take away the liability of the printers for false facts printed . . .": 13 THE PAPERS OF THOMAS JEFFERSON 440, 442 (Boyd ed. 1956).

In his second inaugural Jefferson took occasion to restate his position: "During this course of administration and in order to disturb it, the artillery of the press has been levelled against us, charged with whatsoever its licentiousness could devise or dare. These abuses of an institution so important to freedom and science, are deeply to be regretted, inasmuch as they tend to lessen its usefulness, and to sap its safety; they might, indeed, have been corrected by the wholesome punishments reserved and provided by the laws of the several States against falsehood and defamation; but public duties more urgent press on the time of public servants, and the offenders have therefore been left to find their punishment in the public indignation." 10 WORKS at 133-34.

In December 1835 President Andrew Jackson proposed to Congress the passage of a law which would prohibit the use of the mails for "incendiary publications intended to instigate the slaves to insurrection." CONG. GLOBE, 24th Cong., 1st Sess. 10. See also 3 MESSAGES AND PAPERS OF THE PRESIDENTS 147, 176 (Richardson ed. 1896).

The Senate referred President Jackson's proposal to a Special Committee with John C. Calhoun of South Carolina as Chairman and two Southern and two Northern members—the Senate Committee on the Post Office and Post Roads had but one Southern member. The Special Committee, despite its majority of Southern members, despite

the vehemence of Northern anti-slavery agitation and the dissemination from the North of a volume of abolitionist literature throughout the South, and despite Calhoun's bitter antagonism to abolitionist literature and his intense desire for the enactment of some measure to avoid the horrible insurrection which he feared those activities were engendering, reported adversely on President Jackson's proposal on the ground that the First Amendment forbade any such measure. In support of its conclusions the Committee cited Madison's *Report* on the Sedition Act of 1798. The Committee stated:

> ". . . while they agree * * * as to the evil and its highly dangerous tendency, and the necessity of arresting it, they have not been able to assent to the measure of redress which he recommends.
>
> "After the most careful and deliberate investigation they have been constrained to adopt the conclusion that Congress has not the power to pass such a law . . .
>
> "In the discussion on the point, the Committee do not deem it necessary to inquire whether the right to pass such a law can be derived from the power to establish post offices and post roads, or from the trust 'of preserving the relation created by the constitution between the States,' as supposed by the President. However ingenious or plausible the arguments may be to derive the right from these, or any other sources, they must fall short of their object. The jealous spirit of liberty which characterized our ancestors at the period when the constitution was adopted, forever closed the door by which the right might be implied from any of the granted powers, or any other source, if there be any other. The committee refer to the amended article of the constitution which, among other things,

provides that Congress shall pass no law which shall abridge the liberty of the press—a provision which interposes, as will be hereafter shown, an insuperable objection to the measure recommended by the President * * *."

"That it was the object of this provision to place the freedom of the press beyond the possible interference of Congress, is a doctrine not now advanced for the first time. It is the ground taken, and so ably sustained by Mr. Madison, in his celebrated report to the Virginia Legislature, in 1799, against the alien and sedition law, and which conclusively settled the principle that Congress has no right, in any form, or in any manner, to interfere with the freedom of the press. The establishment of this principle not only overthrew the sedition act, but was the cause of the great political revolution which, in 1801, brought the republican party, with Mr. Jefferson at its head, into power. * * *

"* * * Nothing is more clear than that the admission of the right, on the part of Congress, to determining what papers are incendiary and as such to prohibit their circulation through the mail, necessarily involves the right to determine what are not incendiary, and to enforce their circulation. . . . It would give Congress, without regard to the prohibition laws of the States, the authority to open the gates to the flood of incendiary publications which are ready to break into those States, and to punish all who dare resist as criminals. Fortunately, Congress has no such right. . . ." S. REP. 118, 24th Cong. 1st Sess. 1-5 (1836). The report is also set out in 49 *Niles' Weekly Register* 408 (1836).

However, Calhoun as chairman prepared a bill which in its first section, as amended, made it unlawful "for any

deputy postmaster, in any State, Territory, or District of the United States, knowingly to deliver to any person whatever, any pamphlet, newspaper, handbill, or other printed matter or pictorial representation touching the subject of slavery, where, by the laws of the said State, Territory, or District, their circulation is prohibited; and any deputy postmaster who shall be guilty thereof, shall be forthwith removed from office." CONG. GLOBE APP., 24th Cong. 1st Sess. 437 (1836). The Calhoun bill was likewise defeated: the vote against it was 25 to 19. *Id.* at 442; 12 CONG. DEB. 1737 (1836).

Senator Henry Clay of Kentucky considered this bill "unconstitutional; and if not so, that it contained a principle of a most dangerous and alarming character * * * after much reflection he had come to the conclusion that they could not pass any law interfering with the subject in any shape or form whatsoever * * * the States alone had the power, and their power was ample for the purpose. The bill was calculated to destroy all the landmarks of the constitution, establish a precedent for dangerous legislation, and to lead to incalculable mischief. * * * " Id. at 439.[5]

There is an additional consideration: the framers of the First Amendment, in order to make doubly certain that the federal government did not have or exercise any powers other than those which the Constitution either expressly or by implication delegated to it, provided in the Tenth Amendment: "The powers not delegated to the United

[5] During the course of the debates Calhoun pointed out that "if they once acknowledged the power of Congress to suppress the transmission of these incendiary papers directly, and to say what was incendiary, it would be conceding to it to decide what was not incendiary, as they were in their nature correlative rights. . . ." CONG. GLOBE, 24th Cong., 1st Sess. 298 (1836).

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Madison had originally proposed: "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively." 1 ANNALS OF CONG. 436 (1789) (Gales comp. 1834). As revised this became the Tenth Amendment. An effort was twice made, once by Tucker (*Id.* at 761), and again by Gerry (*Id.* at 767), to carry the idea embodied in this amendment still further by inserting the word "expressly" before the word "delegated". This was the way it had been in the Articles of Confederation.[6] Madison opposed Tucker's proposal "because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae." 1 ANNALS OF CONG. 761 (189) (Gales comp. 1834). Madison's view prevailed. However in the area covered by the First Amendment the Tenth Amendment meant that whatever power there was over utterances, as such, resided, not in the federal government, but in the states or in the people.

The contrast between the exercise of federal power today over the morals of the citizens of this country with that of an earlier day is striking. Federal legislation when our country was new placed much greater reliance on state governments. For example, an act of 1799 directed federal coastal officials duly to observe "the quarantines and other

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[6] Article II of the Articles of Confederation 1777 provided: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

restraints, which shall be required and established by the health laws of any state" with respect to any incoming vessels and "faithfully to aid in the execution of such quarantines and health laws." Act of Feb. 25, 1799, c. 12, §1, 1 STAT. 619. Or again, an act of 1803 told customs officers "to notice and be governed by the provisions of the laws of the several states prohibiting the admission or importation of any negro, mulatto, or other person of colour." Act of Feb. 28, 1803, c. 10, §3, 2 STAT. 206. The Special Committee which reported adversely on President Jackson's proposal for barring the use of the mails to "incendiary publications" cited these acts to show the respect which Congress had been wont to give to state laws. S. REP. 118, 24th Cong., 1st Sess. 6 (1836); 49 *Niles' Weekly Register* 408, 410 (1836).

Furthermore, once it has been determined that federal power exists in a certain area then another threat arises to state governments, and that is the doctrine of preemption. Indeed in *Alberts* v. *California*, 354 U. S. 476 (1957), the California obscenity case at the 1956 term of this Court, counsel for petitioner, relying on federal obscenity legislation, argued: "The scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." Brief for Appellant, p. 115 (subheading). The Court rejected the argument in that case, 354 U. S. at 493-494, but once federal power is established in the obscenity field Congress then has the power to pre-empt this field if it wishes to do so. One can ask with a certain amount of apprehension whether Congress will then add to the recently established Department of Health, Education and Welfare (67 STAT.

18 (1953), 5 U. S. C. 623 (Supp. IV, 1956)) yet another, a Department of Culture!

When one adds to *Roth* v. *United States*, 354 U. S. 476 (1957), the doctrine of pre-emption we are indeed in danger of becoming the "general and consolidated government" [4 ELLIOT, DEBATES 542 (2d ed. 1881)] of which Jefferson in the Kentucky Resolutions of 1798, and the "general consolidated government" [4 ELLIOT, DEBATES 545 (2d ed. 1881)] of which the draftsman of the Kentucky Resolutions of 1799, expressed their fears. It was this problem which Mr. Justice Harlan had in mind when he wrote in his dissent in the *Roth* case:

> "Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in forty-eight States, forty-eight experimental social laboratories. State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation. Different States will have different attitudes towards the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

"Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that 'Lady Chatterley's Lover' goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both of the letter and spirit of the First Amendment.

"I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real danger of a deadening uniformity which can result from nation-wide federal censorship, and in view of the fact that the constitutionality of this conviction must be weighted against the First and not the Fourteenth Amendment. . . ." 354 U. S. at 505-507.

It has been to this problem that President Eisenhower has repeatedly given his attention during his two terms as our chief executive. In a message to Congress in March 1953 he recommended "the creation of a commission to study the means of achieving a sounder relationship between Federal, State, and local governments" 99 Cong.

REC. 2459 (1953). Congress accordingly established a Commission on Intergovernmental Relations (Act of July 10, 1953, c. 185 (67 STAT. 145) "to study the proper role of the Federal Government in relation to the States and their political subdivisions . . . to the end that these relations may be clearly defined and the functions concerned may be allocated to their proper jurisdiction." *Id.*, §1.

The next month he told the 45th annual Conference of Governors, meeting in Seattle, that he had "asked for a commission that would study this proper division between state responsibility and Federal responsibility." For the text of his address see N. Y. Times, Aug. 5, 1953, p. 10, cols. 3-8.

The Commission on Intergovernmental Relations, with Meyer Kestnbaum as its chairman, submitted reports totalling over 2000 pages. The index alone ran to almost 150 pages. In *A Report to the President for Transmittal to the Congress* it mustered the admonition: ". . . Assuming efficient and responsible government at all levels—National, State, and local—we should seek to divide our civic responsibilities so that we:

> "*Leave to private initiative all the functions that citizens can perform privately; use the level of government closest to the community for all public functions it can handle; utilize cooperative intergovernmental arrangements where appropriate to attain economical performance and popular approval; reserve National action for residual participation where State and local governments are not fully adequate, and for the continuing responsibilities that only the National Government can undertake.*" At 6 (1955).

President Eisenhower made the problem the subject of his address at Williamsburg, Virginia at a state dinner of the 49th annual Conference of State Governors. He cautioned that those who "would stay free must stand eternal watch against excessive concentration of power in government." For the text of his address see N. Y. Times, June 25, 1957, p. 16, cols. 2-8. He pointed to the concentration of power in the hands of the communists in Russia, and observed, with reference to recent efforts there at decentralization, that even "Soviet rulers have felt compelled to allow some small part of the Government to gravitate closer to the people." He referred by way of contrast to our governmental system of checks and balances, but continued: "Yet a distinguished American scholar has only recently counseled us that in the measurable future, if present trends continue, the states are sure to degenerate into powerless satellites of the National Government in Washington."

He stated the substance of the Tenth Amendment. With reference to a governor who wired Washington for help instead of asking the state legislature to act, he commented:

> "But does it not tend to encourage the still greater growth of the distant and impersonal centralized bureaucracy that Jefferson held in such dread and warned us about in such great and intense detail?"

He proposed the formation of a joint federal-state committee charged with these duties:

> "One — To designate functions which the states are ready and willing to assume and finance that are now performed or financed wholly or in part by the Federal Government;

"Two — To recommend the Federal and State revenue adjustments required to enable the states to assume such functions; and

"Three — To identify functions and responsibilities likely to require state or Federal attention in the future and to recommend the level of state effort, or Federal effort, or both, that will be needed to assure effective action."

Such a study group has since been created. It is known as the Joint Federal-State Action Committee, and consists of seven federal officials, including three Cabinet officers, and ten state governors. N. Y. Times, July 21, 1957, p. 1, col. 2, p. 40, cols. 3-5.

The concentration of power in the hands of the federal government was also a topic for discussion at the 1956 and 1957 annual meetings of the American Bar Association and of the Conference of Chief Justices. In August 1956 at the 79th annual meeting of the American Bar Association the dominant note in the welcoming speech of Governor Allan Shivers of Texas and in the address of the association's then president, E. Smythe Gambrell, was that federal concentration of power threatened to destroy states' rights. Governor Shivers welcomed the members of the association "to a state whose people believe in the Tenth Amendment." Mr. Gambrell declared that in the "clamor of controversy" over the first eight amendments to the Constitution "our people seem to have overlooked the Ninth and Tenth Amendments." N. Y. Times, Aug. 28, 1956, p. 1, col. 4. In the same month the speakers at the Conference of Chief Justices, composed of the highest judicial officers of the 48 states, took up the same theme.

N. Y. Times Aug. 25, 1956, p. 13, col. 1. The latter body at its 1957 meeting authorized a special committee to study the role of the judiciary as it affected the distribution of power between the federal and state governments. N. Y. Times, July 14, 1957, p. 48, cols. 4-5.

In addition to the president, the Conference of State Governors, the Conference of Chief Justices, and the American Bar Association, a Government Operations subcommittee of the House of Representatives in July 1957 gave attention to the continuing growth of federal power. It held a hearing. One of its witnesses was Meyer Kestnbaum. He said that the study to be conducted by the Joint Federal-State Action Committee as well as a series of regional meetings which the subcommittee planned to hold after Congress adjourned could do a great deal to focus attention on the problem. N. Y. Times, July 30, 1957, p. 16, col. 6.

In September 1957 the National Conference of Chief Justices set up two special committees to study means of slowing the "constant expansion" of federal governmental power. One of these was to study the judiciary's role in the expansion of federal power at the expense of the states. N. Y. Times, Sept. 24, 1957, p. 25, cols. 3-4.

So far little has been accomplished. Nevertheless, on one issue the states prevailed: the ownership of tidelands oil. However, they did not win their victory before the Supreme Court [(see *United States* v. *Texas*, 339 U. S. 707 (1950); *United States* v. *Louisiana*, 330 U. S. 699 (1950); *United States* v. *California*, 332 U. S. 19 (1947)]; but in Congress [(Submerged Lands Act, 67 STAT. 29 (1953); 43 U. S. C. §§1301-1315 (Supp. IV, 1956); *Alabama* v. *Texas*, 347 U. S.

272 (1954)]. This but bears out the observation of the Commission on Intergovernmental Relations in its *Report to the President* that the Court, although the guardian of civil liberties (at 29-30), in comparison with, and contrast to, the other two branches of government, over the past century and a half "except when dealing with slavery, has probably taken the most consistently Nationalist position." *Id.* at 23.

State power can prevail in one other area, obscenity, if the Court will but apply the First Amendment in the manner in which it is submitted its framers intended. Obscenity is such a purely local matter that only local communities should decide what to do about it.

CONCLUSION

Since the Court of Appeals for the Ninth Circuit applied a standard of obscenity in the instant case which conflicts with the standard which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957), this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:
O. JOHN ROGGE
C. C. ROWAN

Appendix I

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,083—June 28, 1957

MERVIN MOUNCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Before:

DENMAN, Chief Judge and POPE and CHAMBERS, Circuit Judges.

Per Curiam:

We are in agreement with Judge Driver's opinion that the standard to be applied in determining whether or not publications are obscene within the meaning of Paragraph 1305(a) of Title 19 U. S. C. "is the judgment of the average, normal, reasonable, prudent person of the community in which the publication is circulated. If, at the time of such circulation, considered as a whole it offends the sense of propriety, morality, and decency of such average person,

it is within the bar of the statute. Otherwise it is not . . . Guided by these general principles . . . the trier of facts must draw the line as best he can between art and pornography—between what is permissible and what is not."

We find no error in the trial court's findings of fact, based upon its application of this standard to the facts established by the record in this case. We adopt Judge Driver's opinion as the opinion of the Court — F. Supp. —

The constitutional questions which appellant has raised in this court and which were not discussed in the opinion of the district court have been foreclosed by the decision of the Supreme Court in Roth v. United States, No. 582, decided June 24, 1957.

The judgment is affirmed.

(Endorsed:) Per Curiam Opinion. Filed June 28, 1957.

PAUL P. O'BRIEN,
Clerk

Appendix I

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15083

MERVIN MOUNCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: June 28, 1957
PAUL P. O'BRIEN, Clerk.

Appendix I

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

Excerpt from Proceedings of Wednesday, September 11, 1957

Before:

Denman, Pope and Chambers,
Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, It is Ordered that the petition of Appellant, filed July 27, 1957, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15083

MERVIN MOUNCE,

vs.

UNITED STATES OF AMERICA

ORDER STAYING ISSUANCE OF MANDATE

Upon application of C. C. Rowan, Esq. counsel for the Petitioner, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Petitioner herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before October 14, 1957. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

WILLIAM DENMAN
United States Circuit Judge.

(Endorsed) Sep. 18 1957
Filed
Paul P. O'Brien,
Clerk
September 18, 1957

DATED: SAN FRANCISCO, CALIF.

Appendix II

United States v. *4200 Copies International Journal*, 134 F. Supp. 490 (D. C. E. D. Oct. 5, 1955).

William B. Bantz, U. S. Atty., William M. Tugman, Asst. U. S. Atty., Spokane, Wash. for libelant.

C. C. Rowan, Spokane, Wash., for claimant.

DRIVER, Chief Judge.

This is a libel action brought by the United States against a large number of imported publications. The basic question presented is, whether such publications are obscene and, as such, subject to forfeiture, confiscation and destruction under the provisions of Section 1305 of Title 19, U. S. C. A. That section, in part, provides that all persons are prohibited from importing into the United States "any obscene book, pamphlet, paper, writing, * * * print, picture, * * *." It authorizes seizure of prohibited publications by the collector of customs and outlines the procedure for their condemnation in the United States District Court. The section further provides that, "No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * *."

Attached to the libel of information in this case as Exhibits A, B, and C, are three reports of seizure by the

United States Customs Service. Exhibit A shows that on May 3, 1955, two cases of paper bound books were seized, consisting of 300 volumes of Helios and 500 volumes of Tidlosa. The report does not indicate whether the two publications were mixed in the two cases, or all the Helios was in one case and all the Tidlosa in the other. Exhibit B shows seizure on May 11, 1955, of one case of paper bound books containing 4200 copies of International Journal, and 500 copies of Afrodite. Exhibit C shows seizure on May 11, 1955, of one case of paper bound books containing 2000 copies of Sun & Health, 1500 copies of Helios, 700 copies of Modelstudier, 200 copies of Paradise, and 100 copies of Licht & Sconheit [sic]. It thus appears that there were 300 volumes of Helios in the seizure Exhibit A, and 1500 copies of the same publication in seizure Exhibit C, but what particular books or periodical issues were in each of the seizures does not clearly appear. Moreover, the "cases" mentioned in the customs reports do not appear to have been kept intact. The United States Marshal's return which is in the file, sets forth a straight listing of the publications taken over by him, with the number of copies of each, without any mention of cases or packages. In this situation it seems impracticable for me to attempt to apply the provision of the statute concerning condemnation of the entire contents of a package if it is found to contain one or more obscene items. I shall, therefore, separately pass upon each publication involved as plaintiff's (libelant's)[1] Exhibits 1-27, inclusive.

[1] For convenience in the trial, the libelant was called the plaintiff and the claimant the defendant. The same designations will be applied in this opinion.

Appendix II

Plaintiff contends that the publications are obscene by reason of the photographs of nude men and women with which they are illustrated. The word "obscene" is not capable of exact definition for the reason that its meaning depends upon prevailing mores at different times and in different places.[2] However, in what may be termed the modern cases, the courts are fairly well agreed upon the general principles which should govern in the application of the statute under consideration and comparable enactments which forbid transmission through the United States mails of obscene publications.[3]

Nudity is not per se obscene. It may properly be employed in works of art and medical and scientific treatises. A publication is not to be judged by one or two isolated illustrations or passages but is to be regarded as a whole. An effort should be made to ascertain and evaluate the dominant effect, and such dominant effect or tone determines its entire character. The effect upon children or upon persons of extraordinary susceptibility to evil influences is not decisive. The standard to be applied is the judgment of the average, normal, reasonable prudent person of the community in which the publication is circulated. If, at the time of such circulation, considered as a whole it of-

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[2] See *United States* v. *Kennerley*, D. C. 209 F. 119, 121. Judge Learned Hand, the author of the opinion therein, put the following query: "If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?"

[3] See for example, *United States* v. *One Book Entitled Ulysses*, 2 Cir., 72 F. 2d 705; *Parmelee* v. *United States*, 72 App. D. C. 203, 113 F. 2d 729; *Burstein* v. *United States*, 9 Cir., 178 F. 2d 665; and *Sunshine Book Co.* v. *Summerfield*, D. C., 128 F. Supp. 564.

fends the sense of propriety, morality, and decency of such average person, it is within the bar of the statute. Otherwise it is not. Guided by these general principles, and without having available any definite yardstick that can be applied, the trier of facts must draw the line as best he can between art and pornography—between what is permissible and what is objectionable and obscene.

The difficulty in the present case, I think, arises principally from a difference of viewpoint. The libeled books, with one exception, are nudist publications designed to portray nudist practices and to secure new converts to the movement. Adherents of the cult conscientiously do not regard as objectionable the full display in mixed company of nude male and female bodies. But nudism is a deviation from the norm at the present time in the United States. Its practitioners are very much in the minority and cannot be said to represent the common viewpoint in this country. The average American, except for works of art or illustrations in medical journals and the like, regards stark nudity, with brazen display of the adult male and female genitalia, as indecent and shocking. This difference of viewpoint was brought out by the testimony of the witnesses in the trial. The defendant called two women, obviously quite respectable—one a mother and the other a grandmother, both members of a nudist organization—who testified that they saw nothing objectionable in the publications in evidence. On the other hand, two other respectable housewives, who appeared to be representative of the average person of the community, examined the same publications and found them to be indecent and obscene.

Appendix II

It is my conclusion that, with some exceptions to which I shall call attention later on, the publications in evidence have the dominant effect and purpose of showing not only without restraint, but with emphasis on normally private areas, the nude figures of both men and women and that, to the average adult person, they are obscene with the meaning of the statute. In reaching that conclusion I have taken many factors into consideration. The character of the printed text in the publications is uniformly unobjectionable, although much of it is in a foreign language and therefore not intelligible to most persons in this country. I have taken into account the relationship of the pictures to the printed articles, the size of the nude figures in the pictures, the relative number of full front and side or back views, and the extent to which the genitals and pubic areas have been covered or minimized by position, posture, distance from the camera, use of light and shade, et cetera.

The libeled books were imported for commercial purposes and were to be sold at a profit through the usual channels of distribution, principally on news stands throughout the country. They were not, therefore, to be limited to members of the nudist cults, and must be judged by their effect upon the general public. In this connection, it is interesting to note that of the twenty-seven publications introduced in evidence as exhibits for the plaintiff, twenty have on the front cover prominently displayed nude pictures, of well-developed, shapely young women. One would be naive, indeed, not to appreciate the commercial value of displaying such front-cover material on the news stands. Although an avowed purpose of the books is to explain the nudist movement, its principles and its prac-

tices, there are relatively very few photographs of the mixed groups of all ages which ordinarily would be found in the nudist park. The great preponderance of the illustrations depicts shapely, well-developed young women appearing in the nude, mostly in front exposures.

The issues of Modelstudier which are in evidence, I think, are clearly within the prohibition of the statute. The publication does not even appear to have any connection with the nudist movement. As the name implies, ostensibly it supplies models for the use of art students.[4] Some of the numbers contain no printed matter at all, and in others the text is wholly, or in large part, in a foreign language. They contain many large closeup, full front-view photographs of nude men and women, plainly showing the genital and pubic areas.

Without going into further detail, I find all of the publications, plaintiff's Exhibits 1-27, inclusive, obscene and subject to condemnation and destruction, with the following exceptions: Plaintiff's Exhibit 2, DeNeue Zeit, is not mentioned at all in the report of seizure of the customs service, but the Marshal's return lists one hundred copies. It cannot be condemned without a record showing that it was a part of the seizure made by the customs service under the statute. I am of the view that, plaintiff's Exhibit 3, Paradies, and plaintiff's Exhibit 4, Paradies, and plaintiff's Exhibit 16, Afrodite, are not obscene. In these publications some of the figures are clothed, and there is a much larger

[4] The following statement appears in plaintiff's Exhibit 15, Modelstudier NR41: "This publication is primarily planned for artists and draughtsmen who desire to better their model drawing."

proportion of side and rear views. There are some shadow silhouettes, and for the most part, the critical areas are concealed, shaded, or minimized by posture or lighting. Also, even to one who claims no expert knowledge in the field there appears to be a good-faith striving for artistic values in the posing and treatment of the subjects in some of the photographs. While they contain a few illustrations which I should regard as objectionable if considered by themselves, I cannot say that, taken as a whole, the dominant effect or tone of the publication is obscene within the meaning of the statute.

Findings in accordance with the views herein expressed may be presented.